IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
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No. 71-1140

SISALCORDS DO BRAZIL, LTD.,

versus

FIACAO BRASILEIRA DE SISAL, S. A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Question Before This Court

Hibernia National Bank of New Orleans, Louisiana has filed a brief in opposition to this petition in an effort to support the decisions of the courts below but it succeeds only in making their errors more apparent. The question for this court still remains, was there a property interest of the defendant, Fiacao Brasileira de Sisal, S.A. (hereinafter referred to as defendant) by the service of the writ in attachment upon Hibernia National Bank on March 20, 1970. Upon that depends the correctness of the lower court's dismissal of this suit for lack of jurisdiction.

POINT ONE

The courts below erred in holding that there was no property interest of the defendant attached, on a consideration of the pleadings, resulting in

a. The departure from the prevailing rule in this court and in the other circuits;

b. Deprivation of plaintiff's right to a trial by jury of the fact issues presented in the pleadings.

The Property Interest Of The Defendant

The writ in attachment against defendant's property was served upon Hibernia National Bank on March 20, 1970. Did Hibernia have any species of property of the defendant at that time? It is conceded that, at that time, Hibernia had outstanding two irrevocable letters of credit addressed to the defendant. One was dated February 9, 1970 and bore number 24349 stating it would pay defendant's draft up to $206,087 against documents described on or before May 25, 1970. The other was dated March 6, 1970 bore number 24381, it was to the same effect as letter number 24349 but expired May 1, 1970 and was for $42,660. Both letters had been sent on their respective dates to defendant and were effective according to their terms on March 20, 1970. Neither letter stated that they were assignable or transferable or payable to bearer. Copies of the letters are reproduced a pp. 34 and 35 of Appellant's Appendix.

Text writers say that letters of credit are contracts between the issuer (usually a bank) and the beneficiary to pay the amount stated according to the terms stipulated. Thus, they state an obligation on the part of the bank to pay, and on the part of the beneficiary to demand payment, on or before their expiring date. In effect, the transaction is a promise to buy documents as described in the letter. See p. 392, Volume 6, Michie on Banks and

Banking; Finkelstein, 1930, Legal Aspects of Commercial Letters of Credit; McCurdy, 35 Harv. L. R. 715; 50 Am. Jur. 2d, Letters of Credit, Sections 1, 28, 29 and 30. These writers uniformally assert the foregoing general contractual obligations as being of the very nature of letters of credit. They cite, in support, cases in this court, in many circuits and in the state courts throughout the land.

Where the letter is addressed to a specifically named party, only that party is entitled to draw on the letter. See Sections 7 and 17 of 50 Am. Jur. 2d, Letters of Credit; 9 C.J.S., Banks and Banking, Sections 175-176; *Bank of Buchanan County* v. *Continental National Bank*, 277 F. 385; and *American Steel Co.* v. *Irving National Bank* (2 C.A.), 266 F. (2d) 43. A special letter never attains the status of a negotiable instrument lacking as it does, negotiability. Assignments by the beneficiary whether by draft, endorsement or separate assignment, are not binding upon the issuer until communicated to it and then they are subject to all of the infirmities existing in the assignor-beneficiary. See *Carrolton Bank* v. *Tayleur*, 16 La. 490; *Finkelstein, supra*, at pp. 277, 278; *Evansville National Bank* v. *Kaufman*, 93 N.Y. 273; and *Ericksson* v. *Refiners Export Co., Inc.*, 264 App. Div. (N.Y.), 525, 527, 528.

Admittedly, Hibernia had not paid the letter of credit before the attachment of March 20, 1970. The only proof of date of payment was Hibernia's answer that the payment was made subsequent to the attachment. Hence, on March 20, 1970, the attachment seized whatever right the defendant had in the two letters of credit. The right was to receive payment upon presentation of the prescribed documents before the expiration dates in May. The courts below have said that no property was attached because on the day in question, the issuing bank had not yet received the documents which would oblige it to pay; hence there was no obligation to pay. Nothing was said of defendant's right, according to the contract, to produce those docu-

ments within the time before the expiration date. Couldn't such a right be enforced in equity? This was overlooked. Indeed, the documents were produced timely and the money was paid. According to the answers of Hibernia, it paid the money to Banco do Brasil, the holder of the draft, on a draft dated February 9, 1970. If that date of that draft means anything, it is that on February 9, 1970, the defendant had already exercised its demand for payment; so that on the date of the attachment Hibernia's obligation had accrued.

The courts below did not hold that Banco do Brasil had priority over the plaintiff. The right of this attachment creditor vis-a-vis; the right of an assignee of the defendant, was never considered or decided by the courts below. Yet, it held that Hibernia had no property of the defendant on two rounds. One in reliance upon *Venizelos* v. *Chase Manhattan Bank* (2 C.A. 1970), 425 F. (2) 461; and the other, on the fact that Hibernia had answered the interrogatories accompanying the writ, ambiguously, by stating it had no property and at the same time attaching the letters of credit which were then outstanding. In any case, in concluding as it did, the court made no analysis of the facts to arrive at its decision.

In relying upon the *Venizelos* case, the court erred as the question here was not involved in Venizelos. Albeit, Venizelos does affirm the liability of the issuing bank to pay the beneficiary upon the presentation of the specified document and the right of the beneficiary to receive such payment. The case considered the liability of the bank in two separate capacities, viz., (a) as the issuer of the letter; and (b) as a depositary of assets, if any, of the party dealing with the beneficiary. The beneficiary sued to recover both as the beneficiary of the letter and as a judgment creditor of Perfilas, the party in business relationship with the plaintiff who had caused the letter to be issued. There was no showing that the bank had any

assets of Perfiles on the date of the service of the execution upon it. The Court of Appeals correctly allowed plaintiff to receive payment under the letter of credit when it held that plaintiff had complied with its terms by submitting the prescribed documents, and it denied recovery on plaintiff's claim as a judgment creditor.

To confuse the holding on that part of the *Venizelos* case denying recovery because the bank was not a depositary of assets of Perfiles with the contractual position of Hibernia to pay as it existed on March 20, 1970, was and is error of the plainest sort. That part of the *Venizelos* case dealing with the position rightfully analogous to the position of Hibernia here, supports the existence of a contractual obligation to pay. *Venizelos*, thus, represents the rule of the Second Circuit that such a contractual obligation was a subsisting contractual obligation with correlative rights in the beneficiary. By the same token, the decisions below would seek to impose a different rule in the Fifth Circuit.

Of course, the reliance upon the conclusory allegation of no property in the bank's answers does not make that allegation conclusive, when at the same time the bank attached copies of the letters of credit and conceded that they were outstanding on March 20, 1970. The conclusion of the pleader is not accepted in place of the writing which is attached *in haec verbe* and it, in fact, defines the relationship of the parties. See Rule 10(c) F.R.C.P.; 71 C.J.S., Pleadings, Sections 30 and 33; *American Surety Co.* v. *Federal Reserve Bank of Kansas City*, D.C. Mo., 1930, 29 F. Supp. 940.

Hibernia here says that on March 20, 1970, it had no property of the defendant because its letters were expressions of a contingent obligation which was not yet performed. Hence, there could not be any liability on its part to pay. This conclusion is obviously erroneous because the letters were outstanding and they had been since

they were sent to the beneficiary on February 9, 1970 and March 6, 1970. They bound the bank, as issuer, to their terms. The issuer had no power to alter those terms before the expiration of the letter without the consent of the beneficiary. See, 6 *Michie on Banks and Banking, Chapter 12, Section 30; Lamborn* v. *National Park Bank*, 123 Misc. Rep. 211, aff'd 212 App. Div. 25; 240 N.Y. 520; and *Dulien* v. *Bankers Trust Co.* (S.D.N.Y.), 189 F. Supp. 922. That obligation was there whether the draft and documents were received before or after the attachment date. In support of its opposition, Hibernia relies on several cases all antedating 1961 when the Code of Louisiana was revised to liberalize the existing rules on attachment among other practices. Under LSA-CCP Art. 8, the Code defines what may be attachable as "property having a situs in this state, claimed or owned by a nonresident". Here, the situs of the contract obligation is the residence of the obligor. Didn't therefore the attachment reach a contract obligation found in the state of Louisiana?

Property is defined by Article 5251, La. C.C., Pro. as including "all classes of property recognized under the laws of the State, movable or immovable, corporeal." So said the trial court below. Also, please note the reference in that decision to Comment C under La. C. Civ. Pro. Art. 3541 stating: "The source article [Art. 240 of the Code of Practice], refers to the defendant's 'property, rights or credits.' The single term property is sufficient to include all species of property, and it is used throughout the title."

These definitions are broad enough to cover the rights of the defendant in the letters before payment, and were designed to make them attachable even though they may not have been considered attachable prior to 1961. Hence, it was error to dismiss this suit for lack of jurisdiction.

The Relative Rights Of Banco Do Brasil And The Attaching Plaintiff

Hibernia's answers also state that the proceeds of letter of credit number 24349 were paid to Banco do Brasil as the owner of the draft. The bank made that decision and it took the risks of doing so. There is no evidence of what the relationship of Banco do Brasil is to the letters in question. Was it a collection bank and hence an agent of the beneficiary? If so, wasn't fraud committed upon the attaching creditor? Was it a purchaser for value with or without notice of the attachment? Regardless, even in its most favorable position, Banco do Brasil was never more than an assignee of the beneficiary taking the avails of the letter with all of the infirmities attaching to its assignor, the defendant-beneficiary, and subject to the defenses of the obligor when it may be called to pay under the letters.

As between such assignee and the attaching plaintiff, the intervening attachment, preceding the asignee's demand for payment, takes precedence. See *Erickson* v. *Refiners Export Co., Inc.*, 264 App. Div. 525, 527, 528. It is an incident of a special letter of credit that only the beneficiary may demand payment, making the letter of credit a non-negotiable obligation, ex proprio vigore. Hence, the draft drawn by the beneficiary is subject to intervening rights of attaching creditors. This rule has or should have been familiar to Banco do Brasil. When it took the draft whether for collection or by purchase, it took the draft subject to this rule. When Hibernia decided to pay (whether true or false, it has never been tested by a trier of the facts) it took the risk of disobedience to the attachment. As a garnishee it should have stood by indifferently as to who should have the money it owed. When an attachment is served up it, it becomes a stakeholder, it must let the law take its course. It is bound to protect the rights of all parties, to render

full disclosure to them, and to notify the parties in interest. It may not prolong the proceedings unnecessarily, either. See 6 Am. Jur. 2d, Attachments, Section 346.

Here, Hibernia did not file its answers (its first communication to plaintiff) until May 4, 1970 after payment of the proceeds to Banco do Brasil. In the meantime, between the date of attachment, March 20, 1970 and the filing of the answers, the defendant's goods had arrived at New Orleans and were delivered to the buyer who had obtained the shipping documents from the bank. Was Hibernia mindful of its legal duty to remain indifferent? Hardly. It made sure that the goods themselves were delivered to the buyer before revealing its intention or decision to pay Banco do Brasil in disregard of the attachment. It would have been an easy enough matter for plaintiff to have attached the goods, despite the legal title thereto being in the holder of the bill of lading. By such attachment that legal title would have become impaired and that impairment would have justified the bank's refusal to pay the letters. Instead, Hibernia clearly acted in disregard of the attachment. It attempted justification for such unlawful action by arguing this litigation, that it had no property rights and it has caused the Court of Appeals to accept such a rule which is patently at variance to the prevailing rule established in this court and in the other circuits in our country. Besides, this matter involves an incident of foreign trade which would make the rule of uniformity, as in admiralty, highly desirable.

Was Plaintiff Denied Its Constitutional Right To Trial Of The Fact Issues?

As the decisions under review were made on a motion addressed to the jurisdiction of the court, and as there were many issues of fact presented in the pleadings, when the court below decided such issue in favor of the defendant, they deprived plaintiff of its constitutional right

to a trial by jury of those issues. Such a trial is a constitutional guarantee by Amendment Seven.

This question has come up on motions for summary judgment. This court has laid down the rule that the motion may be granted if no issue of fact is stated in the papers, but, where issues do appear the motion may not be granted. See 6 Moore's Federal Practice, par. 56.06, and particularly the discussion of the comparison of the motion for summary judgment to the motion for a directed verdict at par. 56.02(10). See, also, *Fideltiy & Deposit Co. of Maryland* v. *United States,* 187 U.S. 315; *Sartor* v. *Arkansas Natural Gas Co.,* 321 U.S. 620. Here the facts are seriously in dispute with respect to the incident of property rights as they existed on March 20, 1970. Even those facts solely in the possession of the bank or the defendant, if unknown to plaintiff, which is so, would entitle plaintiff to a trial by a trier of the facts.

WHEREFORE, plaintiff respectfully submits that serious error needing the intervention of this court has been demonstrated and prays for a writ of certiorari to the Court of Appeals of the Fifth Circuit.

Respectfully submitted,

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Certificate.

I HEREBY CERTIFY that three copies of the above and foregoing petition have been served upon MR. HAROLD R. AINSWORTH, 2307 American Bank Building, New Orleans, Louisiana 70130 and upon MR. LOUIS B. CLAVERIE and MR. PAUL JAYGOOD, 1300 Hibernia Bank Building, New Orleans, Louisiana 70112, by depositing same in the United States Mails, first class postage prepaid, this day of April, 1972.

.....

WILLIAM A. PORTEOUS, III